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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | |
| Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services | ) | CC Docket No. 96-152 |

REPLY TO OPPOSITIONS TO AT&T CORP. PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby replies to the oppositions to its petition for reconsideration and clarification of the First Report and Order[1] ("Order") in this proceeding.

Section 274(b)(3)(B) And Inbound Telemarketing. No party opposes AT&T's request for clarification that § 274(b)(3)(B) requires a BOC providing "inbound telemarketing or referral services" for its electronic publishing affiliate or joint venture to do so pursuant to a

[1] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-35, released February 7, 1997 ("Order"). A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to this reply. All citations to parties' pleadings are to oppositions to petitions for reconsideration, unless otherwise indicated.

written contract or publicly filed tariff.[2] Accordingly, AT&T respectfully requests that the Commission issue an order clarifying this issue.

Section 274(b) "Operated Independently" Requirement. Four parties oppose AT&T's request that the Commission reconsider its interpretation of § 274(b)'s requirement that an electronic publishing affiliate or joint venture "shall be operated independently" from its BOC sibling; however their arguments cannot withstand scrutiny.

Sections 272(b)(1) and 274(b) use the same phrase to mandate that certain BOC affiliates be operated in a fashion that minimizes the risk of cross-subsidy and other abuses, requiring that these entities "operate independently."[3] In its § 272 order, the Commission readily concluded that § 272(b)(1)'s use of that phrase imposed substantive separation requirements in addition to the other requirements of that section.[4] However, the instant Order found that this same phrase had no independent meaning in § 274(b), but instead was fully implemented by the subparts that follow that section.

The Commission offered only a two-sentence explanation of its decision to read the same phrase differently in two closely related sections of the same statute. The Order states

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2 See AT&T Petition, p. 8. As AT&T showed in its comments on the Commission's FNPRM in this proceeding, § 274(b)(3)(B) also requires that contracts between a BOC and its § 274 affiliate be "publicly available." See AT&T Further Comments, p. 6.

3 More precisely, § 272(b)(1) requires affiliates to "operate independently," while § 274(b) requires that affiliates "shall be operated independently." No party to this proceeding has suggested that Congress' use of differing tenses of the verb "to operate" has any interpretive significance.

4 First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as Amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996, ¶ 156 ("Section 272 Order").

simply that § 274(b) is followed by "nine substantive restrictions" which the Commission believed fully define "operated independently" as used in that section; while § 272(b)(1) "is one of five separate substantive requirements in section 272(b)." SBC asserts -- without explanation -- that AT&T "mischaracterizes" the Order's finding, and argues that because Congress' intent is "clear," there is no need for a lengthier discussion of the basis for the Commission's findings.[5] It is well-settled, however, that "[a] conclusory statement, of course, does not in itself provide the 'satisfactory explanation' required in rulemaking."[6] At bottom, the Order's explanation does nothing more than state that § 274(b) is followed by nine subsections, while § 272(b)(1) has no subparts.

AT&T stated in its petition that sections 272 and 274 impose "closely analogous separation requirements," and observed that both sections seek to guard against the significant risk that BOCs would use any market power they retain upon entering previously prohibited markets to engage in cost misallocations and other anticompetitive behavior.[7] Accordingly, AT&T showed that the Commission did not provide a "satisfactory explanation" for its decision to give the phrase "operate independently" a significantly different meaning in each of these sections. Even apart from AT&T's other contentions, this fact alone makes reconsideration both appropriate and necessary.

As to the merits of AT&T's other arguments, SBC and BellSouth argue heatedly that sections 272 and 274 in fact are not similar, and that the Order does not support AT&T's

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5 SBC, pp. 3-4.

6 International Fabricare Institute v. EPA, 972 F.2d 384, 392 (D.C. Cir. 1992) (citing Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

7 AT&T Petition, p. 2.

contentions.[8] This claim simply cannot be credited. Both sections have the same intent -- to prevent BOCs from leveraging their local monopolies into other markets; and the operative language of each provision parallels the other in many respects. The Order speaks for itself in this regard: "BOCs providing section 272 and section 274 services are already required to comply with many of the same requirements; and to the extent these services are combined the complications of complying with both sections 272(b) and 274(b) will be few."[9]

The Commission plainly is correct that nothing in the structure of § 272(b) indicates that subsections (b)(2) through (b)(5) define "operate independently," as nothing in that subsection gives any indication that Congress sought to fix the precise contours of that phrase.[10] It is also correct that the structure of § 274(b) could be read to suggest that subparts (b)(1) through (b)(9) define "operate independently."[11] However, the Order fails to take into account, much less to distinguish, the overwhelming evidence militating against this interpretation.

First, as AT&T stated in its petition, the phrase "operated independently" is placed in a separate sentence at the head of § 274(b), and is stated as an independent and distinct mandate: "A separated affiliate or electronic publishing joint venture shall be operated

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8 See BellSouth, pp. 2-3; SBC, p. 2.

9 Order, ¶ 112

10 Bell Atlantic and NYNEX argue that both sections 274(b) and 272(b)(1) somehow are fully defined by the other substantive requirements of their respective sections. Bell Atlantic / NYNEX, pp. 2-3. If anything, this claim undermines the BOCs' "structural" arguments, as it suggests that the Commission cannot derive any significance from the structure of § 274(b), because -- under this novel view -- a statutory term can potentially be defined by any statutory requirements that happen to be in close proximity to it. See AT&T Opposition to Petitions for Reconsideration, Section 272 Order, p. 3.

11 The parties opposing AT&T's petition support this reading of § 274. See Bell Atlantic / NYNEX, pp. 2-3; BellSouth, p. 3; SBC, pp. 2-3; YPPA, p. 2.

independently from the Bell operating company." The statute then goes on to require that such affiliate or joint venture shall comply with the provisions of sections 274(b)(1) through (b)(9).[12] If Congress intended "operate independently" to have a distinct, substantive meaning in § 272 but not in § 274, it would have been a simple matter to delete the first sentence of § 272(b) entirely, and instead specify only that a BOC affiliate must comply with the specific restrictions of sections 274(b)(1) through (b)(9). Indeed, under the Order's reading of the statute, the first sentence of § 274(b), which mandates operational independence, adds nothing at all to the meaning of that section.

Further, the Commission's reading of § 274(b)(1) requires the untenable assumption that "operate independently" means something very different in that section than in section 272(b)(1). As AT&T showed in its petition, and as the Supreme Court has repeatedly affirmed, "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning."[13] This presumption is heightened when the statutory provisions in question appear in "close proximity" or are "interrelat[ed]."[14] The Commission's oblique observations concerning the structure of sections 272 and 274 are

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12 BellSouth complains that AT&T takes "grammatical liberties" with § 274(b) by stating that the second sentence of that subsection imposes requirements "in addition" to those imposed in the subparts that follow. BellSouth, p. 3. This attack amounts to nothing more than an observation that BellSouth believes that "operate independently" has no independent substantive meaning, while AT&T believes that it does.

13 E.g., Sorenson v. Secretary of Treasury, 475 U.S. 851, 859 (1986) (internal quotation omitted). See also AT&T Petition, pp. 4-5, and cases cited therein.

14 Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647, 655 (1996); see also Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (fact that two welfare programs have a "substantial relation" is further evidence that "identical words used in different parts of the same act are intended to have the same meaning").

simply too insubstantial to overcome the strong presumption that "operate independently" has the same meaning in each section.

SBC states the truism that this canon of statutory construction, like all such rules, need not be blindly adhered to in every case.[15] AT&T has never disputed this point, but has merely stated that clear evidence of congressional intent is necessary if the Commission is to justify its divergent readings of "operate independently." On this front, SBC argues that because Congress somehow "has made its intention clear" in the structure of § 274(b), the Commission is free to give "operate independently" a different meaning in that section than it gave that phrase in § 272. However, the single case SBC cites in support of these contentions not only fails to support its claim, it directly undermines it.

Contrary to SBC's assertion, Nationsbank v. VALIC did not even address the question whether a single word or phrase can have multiple meanings when used in the same legislative enactment.[16] Instead, that decision considered a statute which, in a single sentence, permitted national banks to exercise powers necessary to carry on "the business of banking," and which then listed five specific permitted activities in subsequent clauses. The petitioner in that case argued that these five activities were intended to define the "business of banking," and that other activities thus were implicitly forbidden. The Supreme Court unanimously rejected this argument, observing that it "attributes no independent significance to the words 'business of

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15 SBC, p. 4, n.11.

16 See Nationsbank of N.C. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995). In fact, the portion of this decision which SBC cites address the question whether the states "have regulated annuities as insurance." Id., at 816.

banking.'"[17] The Court then stated: "We expressly hold that 'the business of banking' is not limited to the enumerated powers in [the section in question]" and that the Comptroller of the Currency "therefore has the discretion to authorize activities beyond those specifically enumerated."[18] No holding could be more devastating to the argument that § 274(b)'s "operate independently" requirement must be read to encompass only the requirements of sections 274(b)(1) through (b)(9), rather than stating an independent substantive restriction.

Indeed, the Order itself makes plain that the Commission does not believe that sections 274(b)(1) through (b)(9) fully define "operate independently." Paragraph 64 of the Order "reject[s] the argument that Congress did not grant the Commission the authority" to adopt restrictions in addition to those specified in § 274(b)(1) through (b)(9). As AT&T showed in its petition -- and no party disputes -- the Commission could not possess the authority to impose additional separation requirements pursuant to § 274(b) unless the "operate independently" requirement is a separate, substantive restriction.[19]

The BOC commenters offer three additional arguments against AT&T's petition, none of which is persuasive. First, BellSouth and SBC argue (without citing any authority to support their claims)[20] that the Supreme Court's State Farm decision is inapposite to § 274(b) because the Order does not rescind an existing rule, and therefore the Commission need not

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17 Id., at 814 (interpreting 12 U.S.C. § 24 Seventh) (emphasis added).

18 Id., at 814, n.2.

19 See AT&T Petition, p. 4, n.8.

20 See BellSouth, p. 4; SBC, pp. 5-6, n.17.

explain its decision to depart from its prior interpretations of "operate independently."[21] It is well-settled, however, that the State Farm rationale is applicable not only to a decision to rescind an order, but whenever an agency "departs significantly from its own precedent" or "chang[es] its course."[22]

SBC also attempts to argue that the structure of § 274(b) makes the meaning of "operate independently" sufficiently clear that the Commission need not distinguish its prior interpretations of that phrase.[23] However, as AT&T has shown, it is far from self-evident that sections 274(b)(1) through (b)(9) fully define that phrase. Moreover, Congress must be presumed to have known that "operate independently" was a term of art which the Commission had employed for many years in its regulations.[24] Absent compelling evidence to the contrary, the most reasonable presumption is that the legislature used that phrase consistently with longstanding Commission precedent.

Finally, BellSouth argues that the Commission defined "operate independently" somewhat differently in its cellular separation and Computer II rules.[25] However, the fact that the Commission's interpretation of this phrase may have varied somewhat in those two proceedings

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21 See AT&T Petition, pp. 6-7 (citing MVMA. v. State Farm, 463 U.S. at 43 and Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973)).

22 Citizens Awareness Network v. United States Nuclear Regulatory Commission, 59 F. 3d 284, 290 (1st Cir. 1995) (citing State Farm, 463 U.S. at 42); accord, e.g., Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994); Central States Motor Freight Bureau v. ICC, 924 F.2d 1099, 1110 (D.C. Cir. 1991).

23 See SBC, pp. 5-6, n.17.

24 Cf., e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979) (Congress is presumed to know interpretation courts have given to terms used in prior statutes).

25 See BellSouth, pp. 4-5.

has no bearing on the requirement that the instant Order take account of those prior decisions and provide an adequate rationale for adopting or rejecting their approach. BellSouth also adverts to two Commission orders which it claims permitted greater integration of functions than AT&T advocates.[26] In fact, neither of the passages BellSouth cites purport to interpret "operate independently," but instead address other aspects of the Commission's separation requirements.[27] Further, although BellSouth disputes AT&T's reading of the Commission's precedents, it nowhere contends that that the Order's reading of § 274(b) can be reconciled with the Commission's prior interpretations of "operate independently," or with its nearly contemporaneous reading of that same phrase in the Section 272 Order.

Instead, BellSouth argues only that "the applicable accounting safeguards have been significantly strengthened" since the issuance of the Computer II rules.[28] This argument is simply inapposite, as nothing in § 274(b) directs the Commission to take the relative strength of accounting safeguards into account in interpreting that statute. In any event, the Commission did not rely on this purported distinction between its existing rules and § 274(b), and BellSouth's argument therefore provides no support for the Order's reading of "operate independently."[29]

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26 See id.

27 In addition, the decision BellSouth cites to support its claim that sharing of administrative services is not inconsistent with independent operation predates the decision AT&T relies upon, which directly addresses the meaning of "operate independently." See AT&T Petition, pp. 7-8 (citing Memorandum Opinion And Order, American Telephone and Telegraph Company Report On Services To Be Shared Between Fully Separated Subsidiary And Affiliated Companies And Associated Costing Methodology, 92 F.C.C.2d 676, ¶¶ 42-43 (1982)).

28 BellSouth, p. 5.

29 See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978) ("[W]hen there is a contemporaneous explanation of the agency decision, the validity of

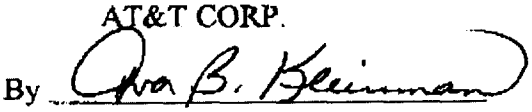
(footnote continued on next page)

## CONCLUSION

For the foregoing reasons, and the reasons offered in AT&T's petition, the Commission should reconsider and clarify its First Report and Order in CC Docket No. 96-152, as set forth above.

Respectfully submitted,

AT&T CORP.

By 

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that action must stand or fall on the propriety of that finding ...."); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

**LIST OF COMMENTERS**
(CC Docket No. 96-152)

BellSouth Corporation ("BellSouth")

Southwestern Bell Telephone Company ("SBC")

Yellow Pages Publishers Association ("YPPA")

Bell Atlantic and NYNEX Telephone Companies ("Bell Atlantic / NYNEX")

**CERTIFICATE OF SERVICE**

I, Terri Yannotta, do hereby certify that on this 14th day of May, 1997, a copy of the foregoing "Reply To Oppositions To AT&T Corp. Petition For Reconsideration and Clarification" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

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May 14, 1997

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